

Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

76-565

JOHN H. BAILEY, *Petitioner*

v.

STATE OF DELAWARE, *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF DELAWARE**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

JOHN H. BAILEY, *Petitioner*

v.

STATE OF DELAWARE, *Respondent*

Petition for a Writ of Certiorari to the
Delaware Supreme Court

Petitioner prays that a Writ of Certiorari issue to
Review the judgment of the Delaware Supreme Court
in the above case.

OPINION BELOW

The opinion of the Delaware Supreme Court is
printed in Appendix A at pages A1-A15.

JURISDICTION

The judgment of the Delaware Supreme Court was
entered on August 11, 1976. The jurisdiction of this
Court is invoked pursuant to 28 U.S.C. §1257(3) and
United States Supreme Court Rule 22.

QUESTIONS PRESENTED

A. Did the presence of the trial court judge eating dinner at the same table as the chief investigating officers, who sat at the Attorney General's table throughout the trial and were key state witnesses during deliberations, 15-20 feet from the jury, coupled with the fact that these officers guarded and protected the jury after the case was over but before the verdict, deprive the petitioner of due process?

B. Did the use for impeachment purposes of petitioner's ~~silence~~ during arrest and after receiving *Miranda* warnings violate due process?

C. Was the petitioner's presumption of innocence destroyed because of the publicity before trial, during the trial, the failure of the court to change venue, sequester the jurors, the association of the chief investigating officers with the court at dinner in the presence of the jury during deliberations and the chief investigating officers guarding and protecting of the jury after the case was over but before the verdict?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

As a result of the August 17, 1975, shooting of Sheila Ferrell, a black teenager in Wilmington, Delaware, John H. Bailey, a white adult, was charged with murder in the first degree¹ and possession of a deadly weapon during the commission of a felony. The trial began on November 18, 1975, in the Superior Court of the State of Delaware, in and for New Castle County, before the Honorable Vincent Bifferato; and, on December 16, 1975, the jury found Bailey guilty of manslaughter and possession of a deadly weapon during the commission of a felony.²

An evidentiary hearing on the petitioner's motion for a new trial from the convictions of manslaughter and possession of a deadly weapon during the commission of a felony was heard on January 16, 1976, before the Honorable Andrew Christie, and the aforesaid motion was denied on January 27, 1976.³

On the manslaughter conviction, the petitioner was sentenced to 30 years, and on the possession of a deadly weapons charge, 10 years, all commencing February 5, 1976, the aforesaid sentences to run consecutively.

Timely appeals were taken to the Delaware Supreme Court from the convictions of manslaughter and possession of a deadly weapon during the commission of a felony. The Delaware Supreme Court affirmed the conviction on August 11, 1976 (opinion at appendix "A").

There was daily, continuous, prejudicial pre-trial publicity, ill will toward the defendant in the community, threats, rioting and demonstrations. The news media emphasized the petitioner's prosecution for assault five years earlier, asserting that the only reason

1. Capital offense.

2. During the closing argument by the State, the issue relating to Questions Presented "B" was raised. Objections and a motion for mistrial were made immediately after closing argument.

3. Relating solely to Question Presented "A".

he was acquitted was that he and his twin brother switched places. Photographs were published showing the petitioner handcuffed and in a bullet-proof vest. Moreover, even the Mayor of Wilmington condemned the incident in the same article indicating that the defendant allegedly shot the girl.⁴

Further, during the trial, leaflets were handed out in front of the courthouse — one such leaflet was made a part of the record and reads:

“Peach-tree trial, people demand justice for Shiela Ferrell; attend trial of racist killer, John “Wealthy” Bailey, 10:00 a.m.-2:00 p.m., Monday-Friday; only people can insure justice; distributed by United Front Against Facism 656-9697.”

The trial judge refused to sequester the jury throughout the trial.⁵

The petitioner denied shooting the victim and testified that a “black man”, whom he identified as Willie Johnson, an eyewitness for the State, shot the victim, while attempting to shoot the defendant. This testimony was confirmed by a defense witness and expert testimony.

During the course of the 4½ week trial, both Lt. Dougherty and Sergeant Curtis were critical State witnesses whose testimony carried substantial weight with the jury, in addition to playing an important role with respect to the courtroom security. They even sat at the prosecutor’s table throughout the entire trial.

After the jury had been sequestered and had begun to deliberate, it was conducted to the DuPont Hotel for dinner. Several bailiffs, two court security officers and four Wilmington police officers including Officers Clark, O’Conner, Dougherty and Curtis, conducted the jury on foot to the Hotel Grill Room and guarded them

4. “We are all very, very sorry . . . It was a very tragic shooting and unjustifiable.”

5. The defense repeatedly requested the trial court to sequester the jurors and moved for a mistrial.

there during dinner.⁶ On the way over to the Hotel, the officers guarded the jury’s flank.

During the course of this dinner, two of the police officers, Sergeant Curtis and Detective O’Conner, left the table where the court personnel, the court and the police officers were seated, to guard the entranceways.

During the dinner, the jury sat at one large table approximately 15 or 20 feet away from the table where the court personnel, together with the aforementioned police officers and Judge Bifferato, the trial judge sat. It is uncontradicted that neither the petitioner nor his representative was present. While the trial judge did not sit next to the police officers, the fact that he was seated at the same table with them was easily known by all members of the jury. In fact, the bailiffs, police officers and trial judge walked right past the jurors’ table and came within 5 feet of them. After the jurors went to the salad bar, the trial judge and everyone seated at his table went to the salad bar, and they all were in direct view of the jury.

The State concedes that these officers were key State witnesses. It is undisputed throughout the entire trial that the testimony of Officers Dougherty and Curtis, the investigating officers, disputed the petitioner’s testimony and his wife’s testimony on such critical points as statements made after the arrest, the voluntariness of such statements, and, in particular, the location of the alleged weapon used in the offense. Said testimony contradicted other defense witnesses. In fact, the defense sought throughout the entire trial to discredit the officers’ testimony because of the inadequate investigation and incompetent police work. Furthermore, up until 10 days before trial, it had been announced by the State that there was only one State eyewitness — suddenly, at trial, there were five.

During the closing arguments, the prosecutor made the following argument:

6. All of these officers testified on behalf of the State.

"Now, there is one more important point as to John Bailey's testimony, and I submit to you that this is probably the most probative of all the points, and I ask you to think about this seriously and try to understand what it indicates. At a point in this trial, John Bailey indicated that he did not do the shooting, that it was Willie Johnson who did the shooting, and the most important thing about this is, when he finally indicated that, did he indicate it before the trial started? Did he indicate it on direct examination? Did he take the first opportunity to shout it out? Did he take the first opportunity to point to Willie Johnson and say, 'He did it'? Did he take the first question that his own attorney asked him about anything about this man and say, 'Wait a minute, I'm on trial for my life, and it was Willie Johnson that did it'? No, he didn't. He waited until cross-examination, until Mr. Denney said it to him specifically, after asking him to describe the man and everything else, he then said, 'Was it Willie Johnson, Mr. Bailey?' And he said, 'Yes, it was Willie Johnson.' " (emphasis added)

In addition, the prosecutor represented that a pattern was present so far as the petitioner's failure to make appropriate responses prior to and immediately after arrest. For example, the prosecutor stated during closing argument:

"The first thing he said was not 'Am I glad to see you. I was scared they were going to pin it on me, and I didn't do it.' He didn't say that.

"This is when she didn't say, 'Well, I understand that you are looking for my husband, but I would like you to know before you go in there that he didn't do anything.' Never said that.

"Should I tell them, 'I didn't have a gun, 'because I didn't. Should I tell them that a black man said that, because he didn't do it? He said it, 'Gee, I'm not sure whether to tell them or not.'

"Maybe he should have told them he did do it just for the sake of an interesting story."

Other prejudicial remarks include:

"... as he sat on the stand, he had to listen to the questions and think of answers that made it sound like he was innocent. ..."

REASONS FOR GRANTING THE WRIT

- A. The Presence of the Trial Judge Eating Dinner at the Same Table as the Chief Investigating Officers Who Sat at the Attorney General's Table Throughout the Trial and Were Key State Witnesses, During Deliberations, 15-20 Feet From the Jury, Coupled with the Fact That These Officers Guarded and Protected the Jury After the Case Was Over but Before the Verdict, Deprived the Petitioner of Due Process.**

The petitioner's research reveals several decisions dealing with either the presence of the trial judge with the jury during deliberation or the investigating officers guarding and protecting the jury during deliberations. However, few cases can be found where a combination of both exist.

Cases such as *People v. Silverman*, — N.Y. Sup. —, App. Div. 2d Dept., 297 N.Y.S. 449 (1937); *Veal v. State*, — Tenn. Sup. Ct. —, 268 S.W. 2d 345 (1954); *State v. Wroth*, — Wash Sup. Ct. —, 47 P.106 (1896); *State v. Duvel*, 4 N.J. Misc. R. 719, 134 A.283 (1926); *Guzzi v. Jersey Central Power and Light Company*, —

N.J. Super. —, 115 A.2d 629 (); *Danes v. Peirson*, 6 Ind. App. 530, 33 N.E. 976 (1893); *State v. Cotter*, — Wis. Sup. Ct. —, 54 N.W. 2d 43 (1952),⁷ demonstrate that no communication of any type ought to take place between the judge and jury after the case has been committed to them by the charge of the judge, unless in open court, because of the tremendous influence of the judge on the verdict.

Furthermore, the Court held that in *Duvel* and *Guzzi*, *supra*, that if the record fails to disclose whether or not the communication was prejudicial, it is presumed to be so and constitutes cause for reversal.

On the issue of the propriety of key state witnesses guarding and protecting the jury after the case is over but before the verdict, several decisions are pertinent including *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965); *People v. Butler*, — Ill. App. —, 318 N.E. 2d 680 (1974); *People v. Kowoleski*, — Ill. Sup. Ct. —, 145 N.E. 203 (); *State v. Tyarks*, — Mo. Supr. —, 433 S.W. 2d 568 (1968).

As a result of the combination of actions of the trial judge as well as those of the chief investigating officers, the credibility of those officers was enhanced, and the credibility of defense witnesses completely destroyed. Throughout the trial, the defense asserted that the officers were not credible due, in part, to their inadequate investigation. Being guarded and protected by those same officers *who sat at the prosecutor's table throughout the entire trial*, and, then, during deliberations, eating dinner at the same table with the trial judge could only mean to the jurors that the police officers were credible, and the defense witnesses were not.⁸

One can only imagine the position which the State would take in this case if the entire family of the peti-

7. See also *State v. Christie*, 91 N.J. Super. 420, 221 A.2d 20 (1966); *Dolbey v. Cook*, — Ky. Ct. of App. —, 434 S.W.2d 35 (1968).

8. These same officers also guarded and protected the jury during the entire trial.

tioner, including the petitioner's wife, ate dinner at the same table with the trial judge in the presence of the jury. What has happened in this case prejudiced the petitioner just as much as if the situation were reversed.

The fact that the jury did not completely accept the police contention of first-degree murder is significant to show that there was a debatable question throughout the entire trial as to whether the petitioner did, in fact, shoot the girl; and the petitioner submits that, had not the unfortunate incident discussed, *infra*, occurred, this petitioner would have been acquitted of all charges.

Accordingly, the Supreme Court of Delaware was in error in refusing to reverse the lower court's denial of defendant's motion for a new trial on the charges of manslaughter and possession of a deadly weapon during the commission of a felony and in refusing to find that such conduct denied defendant's right to a fair trial.⁹

B. The Use for Impeachment Purposes of Petitioner's Silence During Arrest and After Receiving Miranda Warnings, Violated Due Process.

In *U.S. v. Hale*, 95 S.Ct. 2133 (1975), in affirming the decision of the Court of Appeals for the District of Columbia which reversed the District Court, this Court held that inquiry into a defendant's prior silence impermissibly prejudiced the defendant and infringed on his right to remain silent under *Miranda*.

Moreover, in the recent decision of *Doyle v. Ohio*, — U.S. —, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976), this Court rejected the State's plea of necessity as justifica-

9. Petitioner submits that this issue, *supra*, has not heretofore been decided by the U. S. Supreme Court.

tion arguing that a discrepancy between defendant's exculpatory story at trial and silence at arrest, gives rise to inference that the story was fabricated somewhere along the line to fit within the facts of the State's case. The Court held that the use for impeachment purposes of petitioner's silence at the time of arrest and after receiving *Miranda* warnings violated due process.¹⁰

The effect of closing argument can be as prejudicial to Fifth Amendment Right issues as questioning on cross-examination. *White v. U.S.*, — D. C. App., 248 A.2d 825 (1968).

In this case, the prosecutor's comment questioning why the petitioner failed to point out Willie Johnson prior to the trial was a highly prejudicial comment on the defendant's right to remain silent. Moreover, the prosecutor indicated that this failure by the petitioner was probably the most probative of all the points.

Furthermore, this prejudice was compounded by the State's use of the lack of reaction shown by the petitioner through questioning of petitioner's wife as implying that the petitioner must be guilty and, in addition, was further prejudiced by the prosecutor commenting on cross-examination as to what the petitioner did not say at the time of arrest.

The logical assumption which the jury would draw, is that since the petitioner prior to trial did not make his position known, everything he said at trial which was not mentioned to the police prior to trial must be a lie.

The petitioner objected and moved for a mistrial and both were denied.

Accordingly, the Delaware Supreme Court was in error in refusing to reverse the Superior Court's denial of petitioner's motion for a mistrial.¹¹

10. See also *State v. Anderson*, — Ariz. Sup. Ct. —, 517 P.2d 508, 511 (1973); *Sands v. State*, — Okla. Ct. Crim. App. —, 542 P.2d 217 (1975); *Buckanan v. State*, — Okla. Crim. App. —, 523 P.2d 1134 (1974).

11. Petitioner submits that the Delaware Supreme Court's decision was probably not in accord with applicable decisions of the U. S. Supreme Court.

C. The Petitioner's Presumption of Innocence Was Destroyed Because of the Publicity Before Trial, During the Trial, the Failure of the Court to Change Venue, Sequester the Jurors, the Association of the Chief Investigating Officers Guarding and Protecting the Jury After the Case Was Over but Before the Verdict and Their Association with the Court at Dinner in the Presence of the Jury During Deliberations.

With the constant prejudicial newspaper publicity prior to the trial, specifically, the newspapers' jocular attitude towards the petitioner's prior acquittal on the assault charges, the Mayor's statement in the same article where the petitioner was accused of shooting Sheila Ferrell and with the constant radio and TV coverage prior to trial, everyone in Wilmington knew who the petitioner was and felt ill will towards him. Riots and demonstrations filled the City. The lower court, nevertheless, refused to change venue at the request of the defense.

Further, during the trial, the court refused to sequester the jurors. Again, during the trial, there was constant publicity from all forms of news media and even hate literature was handed out in front of the courthouse. Because of all of this prejudicial publicity, demonstrations, riots and hate literature, the jurors were severely prejudiced against this petitioner;¹² and, if, in fact, there was some juror who was not, he would have been pressured into a conviction.

The aforesaid prejudice was compounded when, as detailed in question "A", the chief investigating officers, key state witnesses, critical to the State's case,

12. During the trial, the jurors were questioned each day collectively as to exposure to prejudicial publicity. They were not examined individually and out of the presence of the other jurors. *Maren v. U. S.*, 383 F.2d 805 (10th Cir. 1967); *U. S. v. Acardo*, 298 F.2d 133 (7th Cir. 1962); *Smith v. State*, Del. Sup. Ct. 317 A.2d 20 (1974).

accompanied, guarded and protected the jurors to dinner during deliberations and sat at the same table with the trial judge.

In *Turner, supra*, the Court cited *Irwin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751, wherein this Court said:

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (at 549)

Nothing better highlights how the preceding facts destroyed the presumption of the petitioner's innocence than the jury's complete disregard of the eyewitness testimony and expert testimony of Dr. Werner A. Spitz, Chief Medical Examiner of Wayne County, Detroit, and formerly an advisor to the Rockefeller Committee concerning the John F. Kennedy assassination. Dr. Spitz's testimony supported the petitioner's pleas of innocence, based upon physical facts. Absent the prejudicial facts contained in this argument which destroyed the petitioner's presumption of innocence, the petitioner would have been acquitted.¹³

13. The petitioner submits that the Delaware Supreme Court's decision was probably not in accord with applicable decisions of this Court.

CONCLUSION

For all the foregoing reasons, this petitioner submits that a writ of certiorari should be granted.

Respectfully submitted,

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A1

IN THE
SUPREME COURT OF
THE STATE OF DELAWARE

No. 37, 1976

JOHN H. BAILEY, *Defendant below, Appellant,*

v.

STATE OF DELAWARE, *Plaintiff below, Appellee.*

Submitted: June 14, 1976

Decided: August 11, 1976

Before HERRMANN, Chief Justice, DUFFY and
McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Morton Richard Kimmel and Paul H. Spiller, of
Kimmel, Spiller & Bradley, Wilmington, for the defend-
ant below, appellant.

Richard J. McMahon, Deputy Attorney General,
Wilmington, for the plaintiff below, appellee.

HERRMANN, Chief Justice:

The defendant, John H. Bailey, was indicted for murder in the first degree and for possession of a deadly weapon during the commission of a felony. After trial by jury, he was convicted of manslaughter and the felony weapon charge, and was sentenced to imprisonment for 30 years for the manslaughter and 10 years for the felony-weapon offense, the sentences to run consecutively.

The defendant appeals on 12 grounds. In considering those grounds, a brief overview of the State's case and the defendant's case is helpful.

The State's Case

The victim, Sheila Ferrell, a twelve year old girl, was shot in the back at about 6:50 p.m. on Sunday evening, August 17, 1975. When shot, the victim was being chased by the defendant whose house was located about one-half block from the scene of the shooting. The chase began when the defendant became enraged by the belief that the victim, together with others, had stolen furniture and furnishings from his house or fruit from a peach tree in his backyard.

Five eyewitnesses testified that the defendant pointed a gun at the girl during the chase and shot her in the back, after firing a first shot and shouting a warning to stop.* The defendant continued to chase the girl until she collapsed on the porch of her house one block away. The defendant fled the scene after informing bystanders that the girl had stolen his furniture.

The police, on the scene within 10 minutes after the shooting, were provided with a description of the

* Darryl Wright, age 16, testified:

"Well, he [the defendant] took and got out of the car and said come down from the peach tree, and they all start running, jumped off the garage roof, and the girl, she took and ran, and then he took and ran after her till he got to the corner, and he said, 'Stop or I'll shoot,' and he shot her."

Dwayne K. Stewart, age 11, testified:

"First I was * * * saw the man [the defendant] take one shot, and he said, 'Halt before I kill you,' and he kept on running, and then he shot her."

Valencia Weddington, age 14, testified that she heard the defendant shout at the victim "Stop or I'll kill you" or "some thing like that;" that the defendant "held his hand out" and then she heard something "that sounded like a firecracker."

William Ransom, age 13, testified " * * * he [the defendant] stopped at the corner, he held up his gun with two hands, and he says, 'Stop or I'll kill you,' and he shot her."

Willie Johnson, age 19, testified:

" * * * he [the defendant] stopped and extended his arm. * * * I seen a pistol in his hand. * * * I heard another shot, I saw a little smoke, and Sheila clenched her chest."

assailant and the license number of his car. The license number was traced to the nearby residence of the defendant's parents. The police arrived there within 45 minutes of the shooting, but were refused entry by the defendant's wife. After she was told what they wanted, she asked the police officers "What are owners to do when people trespass and pick peaches?" and then stated that her husband was not in the house. A search warrant was obtained and a search of the house began at about 9:00 p.m. The defendant was found hiding in the attic above the garage. The vehicle which had been identified at the scene of the shooting was found in the garage with the hood up; it appeared that someone had been working on the car.

Upon being found in the attic, the defendant was then and there given his Miranda warnings twice. The police officers then asked the defendant what he had done with the gun he had at the scene of the shooting. The defendant stated that he had thrown it in the river near the police pistol range. When the officers questioned the opportunity and time available since the shooting to accomplish such disposal, the defendant stated that he thought he should get some advice. No further questions were asked. A search of the house revealed an empty box which, according to its label, had contained a .25 caliber semi-automatic pistol; also found were a supply of ammunition for the pistol and miscellaneous other types of ammunition.

At the trial, the defendant admitted attempting to create the false impression that his car had been in the garage for some time. He explained this action and his hiding as a stall for time until his father arrived home, stating that it was his hope that his father could act as a mediator for him with the police. He also testified that he did not have a gun at the scene of the shooting and had only told the police that he had thrown the gun into the river so that they would let him out of the attic alive.

Expert testimony was adduced to the effect that the course of the bullet that struck the victim was consistent with the accounts of the eyewitnesses.

The Defendant's Case

The defendant denied shooting the victim. He testified that in 1964 he gave the .25 caliber pistol to his brother, a resident of Florida, and that he has not owned a gun since. He admitted chasing the victim, angered by the trespasses on, and theft of, his property; but asserted that he carried a door handle in his hand, not a gun, as he ran. He testified that a "black man", whom he identified as Willie Johnson, an eyewitness for the State, was standing on the route of the chase and that it was Johnson who shot the victim by accident in an attempt to shoot the defendant. The defendant testified that he ran away and hid because he feared the violent results of the suspicions he knew had centered upon him.

A defense witness testified that he saw a "black man" standing on the route of the chase, with an unidentified object in his hand and smoke swirling about him, as the defendant and the victim ran by.

The defense adduced expert testimony intended to show that the course of the bullet was not consistent with the testimony of the eyewitnesses.

The defense attempted to turn the trial into a trial of the police. It was claimed that, in order to placate public outrage, the police attempted to make the defendant a scape goat. In summation to the jury, defense counsel referred to a police "cover-up", and labeled the police work in this case "the Wilmington Watergate"; and counsel stated that "this is the greatest conspiracy in the history of the State of Delaware". In support of these statements, the defense asserted that the police failed to conduct routine investigative practices and procedures, which would have established the defendant's innocence and may have

established the guilt of Johnson, such as the failure to promptly and properly search for the spent bullet and the gun used; the manner of handling a .32 caliber casing, found in the street on the route of the chase; and the failure to take the defendant's finger prints and to make paraffin and other tests of his hands and clothing designed to show the handling of a recently fired pistol. The defense also attacked the conduct of the police, during the search of the house and the confrontation there with the defendant and his wife, as being antagonistic and presumptive of the defendant's guilt.

In the development of the attacks upon police investigative practices and procedures, the motivation, good faith, and credibility of the investigating police officers were brought into issue.

I.

The defendant asserts as reversible error the denial by the Superior Court of a motion for new trial based upon certain events involving investigating police officers who testified as witnesses and sat at counsel table with prosecuting attorneys during the trial. See opinion below, 352 A.2d 415.

A post-trial evidentiary hearing was held on the motion for new trial. Thereupon, the following factual findings were made: (315 A.2d at 417)

"After the jury had been sequestered and begun to deliberate, it was conducted to the DuPont Hotel, one block from the Court House, for dinner. Three uniformed bailiffs had been sworn officially as being the bailiffs officially in charge of the jury. During the dinner hour, three sworn bailiffs were joined by the chief bailiff, two or three additional uniformed court bailiffs, two court security officers and four Wilmington police officers in conducting the jury on foot to the hotel grill room and guarding them during dinner."

"[T]he jury went to the hotel in a compact group with uniformed bailiffs leading the way and bailiffs bringing up the rear. With the bailiffs was one or both of the Superior Court security officers. On a parallel sidewalk, perhaps 15 feet away, the police officers guarded the flanks without having any personal contact with the jurors."

* * *

"During the meal, the jury sat at one large table by themselves and all of the court personnel, together with police officers, sat at a separate large table about 15 or 20 feet away."

"At the table occupied by the Court personnel were the bailiffs, the court security officers and the police officers as well as the official court reporter and the presiding judge. The judge who joined the group at the hotel, did not sit next to any of the police officers, and his part of the table was not clearly visible from the jury's table due to a post and a partition."

* * *

". . . When the jurors left the table to help themselves at the self-service salad buffet table no police officers mingled with the jurors. Instead, the chief bailiff stood informal guard near the salad table and two police officers stood informal remote guard near the exits of the grill room. Later, the judge went to the salad table with some court personnel, but not with the police officers."

* * *

"At no time did the jurors have any personal contact with the police officers, but the jurors could have observed the seating arrangements and might have noticed that the police officers were supplementing the bailiffs in guarding the jury."

The motion for new trial was founded upon the assertion that the defendant's due process right to fair trial by an impartial and unbiased jury was violated in that:

1) Defendant was prejudiced because the police officers who took some part in guarding the jury at supper had been important witnesses for the State, and

2) Defendant was prejudiced because the jury saw (or could have seen) the Judge having dinner at a table where the four police officer witnesses were seated.

The defendant contends that this situation was especially prejudicial to him because the actions of the police witnesses as "protectors" or "guardians" of the jury tended to ingratiate them in the eyes of the jury, and the association with the Trial Judge tended to enhance their credibility and destroy that of defense witnesses. The argument goes that the action of the Trial Judge in dining at the same table with the police witnesses "had the force of conveying an opinion on the merits of the case to the jury"; that, under all of the circumstances, "[E]ating dinner at the same table with the Trial Judge could only mean to the jurors that the police officers were credible and the defense witnesses were not".

In denying a new trial, the Superior Court* concluded:

(1) "That the defendant has failed to show any prejudice to the defendant on account of the remote guarding conducted by the police witnesses"; and (2) that there was no prejudice to the defendant because there "is no indication that he [the Trial Judge] was actually socializing with these witnesses at the meal or at any other time and there was every indication the eating arrangements would have been viewed by the

* Under the circumstances, the motion for new trial was neither heard nor determined by the Trial Judge.

jury as a matter of physical convenience and not a matter of social choice."

For the reasons stated by the Superior Court, *inter alia*, we agree with its conclusion that there has been no violation of the defendant's due process rights and that he is not entitled to a new trial on that ground.

Supplementing the rationale of the Superior Court: The defendant made no effort to show actual prejudice. The question then becomes whether the factual situation gave rise to an inherent prejudice as a matter of law. We think not, for the following reasons:

The State's case against the defendant, founded as it was upon the testimony of five eyewitnesses, was a strong case. None of the testimony of the police witnesses contradicted the eyewitnesses or was otherwise addressed to the foundation of the State's case. The testimony of the police witnesses was addressed to collateral matters, such as the conduct of the defendant and his wife at the time of the arrest, the fruits of the search of the house, and the nature and scope of the police investigation. Such testimony was not essential to the State's case. The conviction of the defendant would stand on a solid foundation were it based on the testimony of the eyewitnesses alone, without more. Thus, since the credibility of the police witnesses was not essential to the validity of the jury's verdict, no inherent prejudice may be found, as a matter of law, in the factual situation before us.

Moreover, the practicalities of the situation explain the circumstances of the occurrence which might have otherwise been more difficult to understand. This homicide created severe racial tensions in the community. Special precautions were taken throughout the trial for the protection of the jury. On the evening in question, as the jury prepared to leave the Court House for dinner, persons were seen loitering suspiciously in the area. Thus, we find the actions of the police witnesses on this occasion to be understandable, as prac-

tical security and administrative measures. We think that any reasonable observer, including the members of this jury, would have so concluded.

In the final analysis, the alternative would have been to summon other police officers, colleagues of the police witnesses, to protect the jurors during the dinner hour. Similarly, any such guardianship could be said to have given rise to personal gratitude on the part of the jury and to have enhanced the credibility of police witnesses. We think, therefore, that the problem here is a matter of degree and as a practical matter it cannot, and does not, rise to the level of an inherent prejudice or basic unfairness as a matter of law.

The defendant relies upon *Turner v. Louisiana*, 379 U.S. 466, 85 Supr. Ct. 546 (1965), where inherent prejudice and denial of due process were found in a situation in which deputy sheriffs, who had custody of, and continuous and close contact with the jury throughout their deliberations, had obtained the confession of the accused and had corroborated the confession as witnesses at the trial. *Turner* is inapplicable on its facts. Also factually inapposite are other cases relied upon by the defendant: *People v. Silverman*, N.Y. Supr. App. Div., 297 N.Y.S. 449 (1937) (prosecutor and judge ate breakfast in the hotel dining room where the jury was also dining); *Veal v. State*, Tenn. Supr., 268 S.W.2d 345 (1954) (trial judge shook his head in disagreement with witness without explaining to the jury what caused his action); *People v. Butler*, Ill. App., 318 N.E.2d 680 (1974) (a prosecution witness was bailiff and in charge of jury throughout trial); *State v. Wroth*, Wash. Supr., 47 P. 106 (1896) (trial judge visited jury room); *State v. Tyarks*, Miss. Supr., 433 S.W.2d 568 (1968) (deputy sheriff, who testified for prosecution, had custody of jury throughout the trial); *Guzzi v. Jersey Central Power & Light Company*, N.J. Super., 115 A.2d 629 (communications between judge and jury outside the courtroom). Other cases

cited by the defendant are equally inapplicable on their facts.

Our failure to find actual or inherent prejudice in the action of the police witnesses here does not mean that this Court approves such action. We presume the good faith of the police witnesses; but they were volunteers in this situation; they had not been requested by the Court to assist the sworn bailiffs. The integrity of the jury is the primary responsibility of the Trial Judge and the sworn bailiffs to whom he delegates that responsibility. The appearances of propriety are often as important as propriety itself. Other police officers should have been sworn as bailiffs, if needed to escort and protect the jury in public places. The police witnesses should have remained completely aloof from the jury and should have dined elsewhere, just as other witnesses and counsel in the case were obliged to do. Slightly greater contact with the jury, or a member thereof, may well have required a reversal and repetition of the 4½-week trial in this case. Police witnesses, however well intentioned, are cautioned against repetition of the course of action which was followed here.

There being no actual or inherent prejudice demonstrated in this situation, there is no reversible error shown.

II.

The defendant contends that the Trial Court erred in denying the defendant's motion for a mistrial based upon certain statements of the prosecution during closing arguments to the jury.* The submission is that

* The statements claimed to be impermissibly prejudicial were the following:

"Now there is one more important point as to John Bailey's testimony, and I submit to you that this is probably the most probative of all the points, and I ask you to think about this seriously and try to understand what it indicates. At a point in this trial, John Bailey indicated that he did not do the shooting, that it was Willie Johnson who did the shooting, and the most

such remarks impermissibly prejudiced the defendant in that they infringed on his Miranda right to silence, citing *United States v. Hale*, — U.S. —, 95 S.Ct. 2133 (1975); *Sands v. State*, Okla. Ct. Cr. App. 542 P. 2d 217 (1975).

The State contends that the prosecutor's remarks, when completely quoted and read in context,* were

important thing about this is, when he finally indicated that, did he indicate it before the trial started? Did he indicate it on direct examination? Did he take the first opportunity to shout it out? Did he take the first opportunity to point to Willie Johnson and say, 'He did it'? Did he take the first question that his own attorney asked him about anything about this man and say, 'Wait a minute, I'm on trial for my life, and it was Willie Johnson that did that'? No, he didn't. He waited until cross-examination, until Mr. Denney said it to him specifically, after asking him to describe the man and everything else, he then said, 'Was it Willie Johnson, Mr. Bailey?' And he said, 'yes, it was Willie Johnson.'

* "Here is a man on trial for his life and he feels that he has enough evidence to indicate that it was somebody else and you have to drag it out of him. You literally have to put it point blank to him or else he would have never said it.

The State obviously did not have to ask that question and it was only by a direct question that that answer came out.

So why, you say? Well, what does that have to do with it? He still said it was Willie Johnson, didn't he?

Think about what the defense has presented to you. They present to you that it was a black man, a mystery man, someone that Klein didn't see him till, 'boom!' he was there.

Where did he come from? Where did he go? What did he do with his gun? These are questions you are not going to worry about too much, but it is going to cross your mind and you are going to think. 'Why would that man do it?' You are not going to dwell on that question too much because you don't know the first thing about this man. This was just some black man, and if there was some black man there, why didn't anybody in the neighborhood see him? If he was going to get that involved in this thing, wouldn't he be somebody that lived in this neighborhood, or something? Didn't somebody see him?

Well, the defense goes along and through cross-examination of witnesses and through little implications that Mr. Klein makes and

clearly addressed to the strategy of the defense during the trial, and not to the silence of the defendant prior to trial. The State argues that the remarks were meant to attack the apparent defense strategy of blaming the shooting upon an unnamed "black man", rather than upon Willie Johnson whose name came out as the assailant only during the cross-examination of the defendant; and that such was the only reasonable meaning of the remarks, taken as a whole.

We agree with the State's view of this matter. There is no reversible error here.

that Mr. Bailey makes, they try to solve that problem for you in a very subtle way. They have to get it into your mind, but they don't want to present you with it fully. They try to have you thinking for that little problem of where did this guy come from and all. They tried it without stating it, let you come to the conclusion. 'Oh, it was Willie Johnson; that explains it.' But they don't want to say to you that it was Willie Johnson unless they absolutely have to. And why don't they want to say to you it is Willie Johnson? Because it is so preposterous when you really get down — once that man comes out and once that is the specific accusation, it is no longer the mystery man; it is now Willie Johnson.

You look at it now and say, 'Wait a minute, Willie Ransom saw him go out of the house after the shooting; he saw him go up the side of 34th Street.' That is what Willie Johnson said he did. He heard the first shot. That is what attracted his attention.

Willie Johnson got there, and he was concerned about the girl and waited for the ambulance and talked to the police right away. And what opportunity did Willie Johnson have to get rid of whatever gun he had?

Well, they didn't want you to look at it that way. They only wanted you to use Willie Johnson for limited purpose, just to have a name, a possibility to shove the problem with a mystery man out of the picture, to say, 'Well, it could have been Willie Johnson,' but they didn't want you to have to confront the fact that their case is based on the fact it was Willie Johnson because they know that you are aware of so many facts that make that hypothesis utterly ridiculous that they don't want to really confront it. That is why it had to be literally dragged out of John Bailey on cross-examination."

III.

The defendant contends that the Trial Court committed prejudicial error in refusing to sequester the jury during the trial.

Jury sequestration is a matter of judicial discretion. *Super. Ct. Cr. Rule 24(f)*. We find no abuse of discretion and, in the absence of a showing of actual prejudice, we find no reversible error. See *Anno.*, 21 A.L.R.2d 1088, 1105.

Again, however, we take the occasion to issue a caveat. This was a capital case surrounded by racial tensions. Fortunately, there was no mishap which may have required a wasteful repetition of this lengthy trial on the grounds of jury interference. In our opinion, sequestration in this type of situation would have been advisable during the entire trial, as protection against any such mishap.

IV.

The defendant contends that the Trial Court erred in refusing to charge the jury on assault in the first, second, and third degrees, for the reason that a question of fact was presented to the jury as to whether the victim's death was caused by the gun-shot wound or by the failure of a hospital nurse to reconnect a respirator 12 days after the shooting, citing *State v. Fleetwood*, Del.Sup., 65 A. 772 (1906); *Feliciano v. State*, Del.Sup., 332 A.2d 148 (1975).

We find no reversible error in this ground.

V.

The defendant argues, as other grounds for reversal, that the Trial Court erred:

A. In denying the defendant's motion for change of venue.

B. In admitting into evidence the statement obtained from the defendant at his parents' home, without a knowing waiver of his *Miranda* rights.

C. In requiring the defendant's wife, when called by the State, to testify regarding her conversations with the police, in violation of a husband-wife privilege.

D. In permitting the State's expert witness to testify regarding the origin of the shot and a police-witness to testify as an expert on ballistics.

E. In commenting on the evidence during the jury charge, in violation of *Del. Const.*, Art. IV, Sec. 19.*

F. In charging on manslaughter without sufficient supporting evidence.

G. In charging on "flight," without telling the jury that the defendant had returned from without the State when on bail and informed of the victim's death.

We find no reversible error in any of these grounds.

VI.

The defendant contends that the "defendant's presumption of innocence was destroyed because of the

*The comments complained of were the following:

"An intention to kill may be shown in various ways, for example, by showing lying in wait, prior threats, a *chase*, other circumstances which show an intention to kill when the fatal attack is made upon the deceased."

"In considering whether a voluntary willful act has a direct tendency to destroy life, you are instructed that where a person selects a deadly weapon or a sharp or heavy instrument or firearm and uses it against another, a jury may find that such use has a direct tendency to destroy life."

"No mere entry onto land or the property of another, however right or wrong it may be, can justify or excuse resorting to the use of a deadly weapon."

"It is not necessary that the weapon be recovered after the commission of a felony for you to find that it is one from which a shot may be discharged. If you find that the weapon, when in the possession of the defendant during the commission of a felony, actually discharged a shot, then you may find that such weapon was a deadly weapon within the meaning of the statute."

"It is not unusual for a criminal case to rely upon circumstantial evidence."

publicity before trial, during trial, the failure of the Court to sequester the jurors, and the association of the chief investigating officers guarding and protecting the jury after the case was over but before the verdict."

Here, in effect, the defendant argues that the sum of the evils claimed is greater than any component.

We are unable to agree.

Affirmed.

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

October Term, 1976

No. 76-565

John H. Bailey, *Petitioner*

v.

State of Delaware, *Respondent*

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF DELAWARE**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-565

JOHN H. BAILEY, PETITIONER

v.

STATE OF DELAWARE, RESPONDENT

Brief in opposition to Petition for a Writ of
Certiorari to the Delaware Supreme Court

Respondent opposes the issuance of a Writ of
Certiorari to Review the judgment of the Delaware
Supreme Court in the above case.

STATEMENT OF THE CASE

The respondent differs with the Statement of
the Case offered by the petitioner in so far as that
statement characterizes various aspects of the case

and draws conclusions therefrom but the overview of the various proceedings, which is found therein, appears sufficient and will not be repeated. The opinion of the Supreme Court of Delaware contains a synopsis of the facts of this case which is considered to be quite concise and accurate by the respondent.

There was in fact publicity after the shooting of Sheila Ferrell. The victim was shot on August 17, 1976, and did not die until August 30, 1976, although there was no hope medically for her recovery from the moment that she was admitted to the hospital. The Mayor of Wilmington at no time referred to the defendant. The defendant never claimed that the shooting was justifiable.

The jury was not sequestered during the trial but extreme care was exercised in its selection and instruction. In addition the trial Court kept daily check on any prejudicial information which may have reached the jury throughout the trial. There were in fact no incidents involving the jury's being exposed to matters not in evidence.

During the trial five eyewitnesses testified to seeing the defendant shoot the victim in the back with a handgun. The defendant admitted that he was chasing the girl when she was shot but stated that he had a car door handle in his hand during the chase rather than a gun. Moreover the defendant admitted pointing the car door handle in the same manner which the State's witnesses had testified he pointed the gun. This contradicted the statement which the defendant had made to the police after his arrest in which he admitted having a gun at the scene of the shooting.

The jury began its deliberations late in the afternoon on December 15, 1976. Early in the evening the jury was conducted to the DuPont Hotel for dinner. The jury was in the charge of three sworn bailiffs and at least three additional bailiffs. These bailiffs shielded the jury from contact with all other persons throughout the trips to and from the hotel and during the dinner itself. The police officers who guarded the periphery of the party had been involved in the case from the beginning. They were present at the courthouse awaiting the verdict,

as was the judge. There was no contact between these officers and the jury. The meal, which was eaten at the hotel by the various people awaiting the verdict in the courthouse, was not a social occasion and did not give the appearance of such.

The jury did not reach its verdict that night and, remaining sequestered, spent the night at the DuPont Hotel. The verdict was reached at approximately noon on December 16, 1976.

The prosecutor indicated during closing argument that the timing of the revelation concerning the identity of the person claimed by the defendant to be responsible for the shooting was probably the most probative point in analyzing the defendant's testimony. It was pointed out that a previous witness for the defense had claimed to have seen a black man standing near the chase scene. It was also pointed out that the defendant had said in his direct testimony that a black man was responsible for the shooting. It was emphasized that the identity of this black man (Willie Johnson, a witness for the State) was not revealed by the defense until the State's cross-examination when it was asked for

specifically. This was claimed to be probative in that it indicated the awareness of the defense of the fact that it would be very difficult for the jury to accept a theory which was based upon Willie Johnson's having done the shooting.

It was also pointed out by the State that the defendant chose to incriminate rather than exculpate himself at the time of arrest and that his explanation that he hid from the police so that his father could help him explain what he had done was not consistent with innocence.

REASONS FOR DENYING THE WRIT

- A. The Petitioner was not Deprived of Due Process by Any Matter During the Jury Deliberations Because the Jury was Directly Controlled and Shielded by the Sworn Bailiffs and the Meal at which the Trial Judge was Present was Clearly not A Social Occasion and Did not Convey Any Message to the Jury Concerning Any Opinion of the Trial Judge.

The petitioner claims that prejudice resulted from the actions of certain officers who were witnesses in the case in guarding the jury on its journey to dinner and being present at dinner at the same table as the trial judge. Moreover the

petitioner claims that this Court should review the decision of the Delaware Supreme Court because this case presents the first occasion when two such matters occurred together. The fact is that neither aspect referred to by the petitioner amounted to the type of incident which was considered prejudicial in the cases cited by the petitioner.

The petitioner has cited, inter alia, State v. Duvel, 4 N.J. Misc. R.719, 134 A. 283(1926) and Guzzi v. Jersey Central Power and Light Company, 36 N.J. Supr, 255, 115 A.2d 629(1955). The petitioner urges that these cases demonstrate that communications by the trial judge with the jury in the absence of counsel are presumed to be prejudicial if the record fails to disclose what the actual communication was. It is a fact that in the case sub judice there were no communications between the trial judge and the jury. The matter referred to by the petitioner was clearly not a social occasion as in the case of People v. Silverman, N.Y. Supr.App.Div, 297 N.Y.S.

449(1937) cited by the petitioner. The dinner was clearly a matter of convenience in order to satisfy the need for food during the wait for the jury's verdict.

The petitioner claims that the accompaniment of the jury by certain police officers who were witnesses in the case is not in accord with this Court's decision in Turner v. Louisiana, 379 U.S. 466(1965). It is clear however that the incident in Turner, supra is comparable to this case only if one looks at the surface of the matter and chooses to ignore the actual facts. The record is clear in the case sub judice that the jury was not in the charge of these police officers but was in fact in the charge of the sworn bailiffs who insulated them from all contact with anyone. In Turner, supra there was clearly contact and communication between the jurors and witnesses- the full extent of that could only be speculated upon as to its content and effect. In this case

the record reveals exactly what occurred and it leaves no room for speculation as to contact or prejudice. That fact is most important because it does not present a situation wherein there is some likelihood of ingratiating on the part of the witnesses with the jury or prejudicial conversations.

The record in this case reveals that there is no new federal question of substance and that the decision of the Delaware Supreme Court is in harmony with previous decisions of this Court.

- B. The Defendant's Due Process Rights Were Not Violated by the Prosecution in Cross-Examination or Closing Argument Because the Main Argument Referred to by Petitioner Concerned Trial Strategy and the Defendant Incriminated Himself at the Time of Arrest and Did Not Remain Silent.

The second reason urged by the petitioner that this Court should review the decision of the Delaware Supreme Court rests on two basic assumptions. The first is that the petitioner

was silent at the time of his arrest and after being given his Miranda warnings. The second is that the prosecution used this silence against him in a manner which has been ruled impermissible by this Court in United States v. Hale, 95 S.Ct. 2133(1975) and Doyle v. Ohio, 96 S.Ct. 2240, 49 L. Ed. 91(1976). Neither of these assumptions is in accord with the facts.

Both the State's case and the defense are set out in some detail at the beginning of the opinion of the Delaware Supreme Court. It is apparent that the defendant admitted virtually every aspect of the State's case at trial. He admitted that he drove up to the scene in his car, that he chased the victim, that he had something in his hand and that he fled the scene and hid from the police. However he stated that he did not have a gun in his hand but rather he had a car door handle. Thus the issue in the case can be summarized in one line; did the defendant have a gun with him or not? Clearly, considering all the other admitted circumstances,

if the defendant had a gun, then he was the one who shot the girl. After being given his Miranda warnings the defendant told the police that he had disposed of the gun which he had at the scene of the shooting by throwing it into the river. He also argued with them concerning his opportunity to effectuate that disposal of the weapon. It may be that merely opening one's mouth to say one's name or some other harmless matter does not obviate a finding of silence but surely the type of incriminating statement made by this defendant (which he recanted at trial because it was so obviously inconsistent with the rest of his exculpatory testimony) cannot be branded as "silence". See Jackson v. State, 19 Cr.L. 2109, Tenn. Sup.Ct(1976).

The argument claimed by the prosecution to be "the most probative" and quoted at length in the opinion of the Delaware Supreme Court clearly dealt with the fact that the defendant did not mention the identity of the black man whom he claimed did the shooting until cross-

examination. The person named was a principal State's witness and the theory advanced by the State was that the defense was reluctant to accuse that person specifically because it would make the weakness of that assertion too obvious to the jury. It was emphasized that on direct examination the defendant blamed a black man but did not name him. This was clearly not a comment upon the defendant's silence-assuming arguendo that the concept of silence could survive the incriminating statement made by the defendant.

The defendant explained at trial that he had hidden from the police in the hope that his father would return and help him explain the incident to the police. The prosecution questioned how such an explanation of hiding from the police was consistent with the defendant's assertion that he had done nothing wrong. Moreover, the prosecution pointed out that the defendant chose to tell the police that he had a gun at the scene of the shooting and that he had disposed of that gun rather than tell them the

exculpatory version which he offered at trial which was built upon his claim that he did not have a gun.

The first thing he said was, "I threw the gun in the river by the police pistol range". The first thing he said was not, "am I glad to see you, I was scared they were going to pin it on me and I didn't do it". He didn't say that. He said "I threw the gun in the river by the police pistol range".

Such inconsistency is clearly probative and does not amount to a denial of due process. CF Harris v. New York, 401 U.S. 222(1971).

Therefore, the decision of the Supreme Court of Delaware was in conformity with previous decisions of this Court.

C. The Petitioner's Presumption of Innocence Was Not Destroyed Before Trial Nor Before the Verdict was Rendered.

The petitioner has offered as his final reason why this Court should review the decision of the Delaware Supreme Court a general argument that his presumption of innocence was destroyed by various factors which were part of the trial.

The trial court considered the motion of the petitioner for a change of venue and conditionally denied the motion. The trial court stated that the normal jury selection process in a capital case, which included extensive voir dire, would be followed and if it was not possible to impanel an impartial jury by this method, the venue of the trial would immediately be changed to Sussex County (one of the three counties in Delaware). The actual voir dire went through approximately 110 prospective jurors from which five were dismissed because of an opinion as to the defendant's guilt, and three were dismissed because of a closed position that he was innocent. The great majority of the array testified that they would decide the case based upon the evidence at trial. This is the important test:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is

particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717 at 722(1961).

It should also be noted, as recognized in Parson v. State, Del.Supr. 222 A.2d 326, 336(1966), rev'd on other grounds; that Delaware is an extremely small state which is served by one major newspaper and therefore the same news is dispersed throughout the state. Thus the trial court's action was reasonable and within its sound discretion.

Moreover it is clear that the sequestration of jurors is also a matter which is controlled by the sound exercise of discretion by the trial judge. The petitioner has not attempted to show any actual prejudice which resulted from this discretionary decision of the trial judge. See

Margolis v. United States, 407 F.2d 727 (7th Cir. 1969).

It is submitted that the petitioner has grouped together matters which were handled by the trial court within the bounds of its discretion, reviewed by the highest court of this state favorably, and attempted to create by the repetition of his first argument an issue which should be decided by this Court. A close examination of each point reveals no reversible error and the grouping of these matters does not create a situation wherein the Delaware Supreme Court has rendered a decision in conflict with the previous holdings of this Court.

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CONCLUSION

The respondent submits that the petition does not contain sufficiently special and important reasons to grant review of the decision of the Delaware Supreme Court on writ of certiorari.

Respectfully submitted,

Richard R. Wier
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IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.

FILED

JAN 19 1977

MICHAEL RODAK, JR., CLERK

October Term, 1976

No. **76-565**

JOHN H. BAILEY, *Petitioner*

v.

STATE OF DELAWARE, *Respondent*

REPLY BRIEF FOR PETITIONER

On Writ of Certiorari to the Supreme Court of the State
of Delaware.

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STATEMENT OF THE CASE

The Petitioner, John H. Bailey, incorporates by reference the entire statement of the case as presented in the petition for writ of certiorari to the Supreme Court of the State of Delaware.

A review of the statement of the case as contained in the State's brief in opposition to the petition reveals distortions of fact on each and every page. For example, it is completely inaccurate to state that there were no incidents involving the jury's exposure to matters not in evidence.¹ The fact is that the jury was exposed on a continuous basis from all forms of news media to prejudicial statements each and every day of the trial, and, in fact, during the trial, leaflets were handed out in front of the courthouse—one of which was made a part of the record and is fully set forth at page 4 of the petition. Moreover, the jury was exposed to seeing the presence of the trial judge eating dinner at the same table as the chief investigating officers.²

The Delaware Supreme Court cautioned against this behavior.³

While the State suggests that five eyewitnesses testified seeing John Bailey shoot Sheila Ferrell, the State fails to mention that four of the five were children whose testimony was highly discredited during the trial. In fact, one of those children told an adult one or two days after the alleged shooting that he knew nothing about it. Also, it wasn't until the week before the trial was to start that the State made known that it had five eyewitnesses. All along, the State had confirmed through the Deputy Attorney General handling this case and the chief investigating officer that there was one eyewitness.

1. State's brief—2.

2. See petition—7.

3. A.10.

It is further a gross distortion to say that the petitioner told police after his arrest that he had a gun at the scene of the shooting. The fact is that after the police officers cornered him with guns drawn and while the defendant was in fear of his life, did he tell them that he threw the gun in the river which the officers knew was impossible because of the distance involved.⁴ It is significant that, just prior to this time, he had received extremely rough treatment by the police, double handcuffed, thrown down on the floor in a room where there were no windows with guns drawn and was afraid of being killed. It was also uncontradicted that members of the same police department killed a man under similar circumstances and that the defendant was aware of that fact. Moreover, dozens of police officers had surrounded the house where the petitioner was before they entered.

To say that there was no contact or communication between the trial judge, officers and the jury, is out of line with reality. The State does not contest the fact that officers who ate dinner with the trial judge, in full view of the jury were key prosecution witnesses. In fact, the State does not attempt to contradict any of the facts outlined at pages 4 and 5 of the petition with respect to this issue.

Nor does the State rebut the fact that the prosecution attempted to represent that a pattern was present so far as the petitioner's failure to make appropriate responses prior to and immediately after arrest.⁵

It is true that the petitioner had a door handle in his hand after leaving his vehicle just prior to the time that Sheila Ferrell was shot. The fact is, which was uncontradicted at trial, that the door handle to the vehicle had not been affixed to the door, and the defendant had to pick it up off the floor of the car to open the car door with, and

4. State's brief—3.

5. Petition—6, 7; State's brief—4, 5.

that was the sole reason that he had it in his hand at the time.

It is important to point out that while driving to 35th and West Streets, the petitioner was with his wife and two young children, one of which was an infant.

Moreover, not only did the physical evidence present demonstrate affirmatively the defendant's innocence, Dr. Spritz confirmed this scientifically, and there was an independent eyewitness who also confirmed it.

ARGUMENT

A. The Presence of the Trial Judge Eating Dinner at the Same Table as the Chief Investigating Officers Who Sat at the Attorney General's Table Throughout the Trial and Were Key State Witnesses, During Deliberations, 15-20 Feet From the Jury, Coupled with the Fact That These Officers Guarded and Protected the Jury After the Case Was Over but Before the Verdict, Deprived the Petitioner of Due Process.

The petitioner, John H. Bailey, incorporates by reference the argument as contained at pages 7-9 in the petition.

As stated earlier, to say that there was no communication between the trial judge, the officers and the jury is out of touch with reality.⁶ Obviously, communicate means to convey, impart or connect as well as the sharing of knowledge between individuals. It is respectfully submitted that the communication and contact as described in the petition at pages 7-9 was so prejudicial that it destroyed the credibility of all defense witnesses and enhanced the credibility of the State witnesses.

The Delaware Supreme Court stated:

"The appearances of propriety are often as important as propriety itself." (A.10)

The court went on to warn the police not to conduct themselves in such a manner as occurred in this case, but the court would not reverse. The petitioner respectfully submits that the Delaware Supreme Court was in error in refusing to reverse the lower court's denial of the defendant's motion for a new trial on the charges of manslaughter and possession of a deadly weapon during the commission of a felony and in refusing to find that such conduct denied the defendant's right to a fair trial.

6. State's brief—6.

B. The Use for Impeachment Purposes of Petitioner's Silence During Arrest and After Receiving Miranda Warnings, Violated Due Process.

The petitioner incorporates by reference argument B as contained at pages 9 and 10 of the petition.

Once again, the State distorts the facts by suggesting that the defendant admitted virtually every aspect of the case: by failing to indicate that the car door handle was in his hand, because it was necessary to take it off the floor of the car to open the door to begin with; and by suggesting that the defendant told the police that he had disposed of the gun which he had at the scene of the shooting by throwing it into the river; and in failing to point out the tremendous pressure and fear which the defendant felt. Even one of the officers who was holding a gun admitted that he was shaken up at the time.

The State's argument relies upon the hope that the jury would understand the reason that the prosecutor's prejudicial comments were being offered without explaining to the jury the purpose for which it was being offered and in what manner it should not be considered.

The petitioner submits that this Court has already dealt with the type of argument which the State offers in *Doyle v. Ohio*, — U.S. —, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

The petitioner submits that the logical assumption which the jury would draw is that since the petitioner, prior to trial, did not make his position known, everything he said at trial which was not mentioned to the police prior to trial, must be a lie. The State then compounds this prejudice by attempting to use the lack of reaction shown by the petitioner through questioning of his wife, as implying that the petitioner must be guilty. Moreover, this was further prejudiced by the prosecutor's comments on cross-examination as to what the petitioner did not say at the time of arrest.

Accordingly, the statements by the prosecutor were comments upon the defendant's right to remain silent.

C. The Petitioner's Presumption of Innocence was Destroyed Because of the Publicity Before Trial, During the Trial, the Failure of the Court to Change Venue, Sequester the Jurors, the Association of the Chief Investigating Officers Guarding and Protecting the Jury After the Case Was Over but Before the Verdict and Their Association with the Court at Dinner in the Presence of the Jury During Deliberations.

The petitioner incorporates by reference section C as contained at pages 11 and 12 of the petition.

The defendant at trial relied heavily upon physical evidence which supported him, the testimony of an independent eyewitness and that of Dr. Spitz, as well as his own testimony to demonstrate to the jury that he was, in fact, innocent. While the initial charges in the indictment were murder first-degree, the jury did convict the defendant of manslaughter along with the weapons violation.

The petitioner was convicted only because of the tremendous pressure exerted by the community on the jury which stemmed from constant threats, rioting and demonstrations, coupled with the failure of the court to change venue, sequester the jurors, the association of the chief investigating officers guarding and protecting the jury after the case was over but before the verdict, and their association with the court at dinner in the presence of the jury during deliberations.

Surely, it is the sum of everything that takes place in a trial that convicts a man. Here, there are so many problems of a prejudicial nature prior to, during, and after the trial was over, that it was, in fact, impossible for the defendant to get a fair trial.

The State does not rebut the fact that the physical evidence in the record tremendously supported the defendant's plea of innocence. The fact is that the State's case was won before the trial started and was reinforced in spite of the strong defense because of the prejudice

which occurred during the trial and afterward during deliberations.

The petitioner, John H. Bailey, submits to this Court that his presumption of innocence was destroyed.

CONCLUSION

For all of the foregoing reasons, this petitioner submits that a writ of certiorari should be granted.

Respectfully submitted,
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